

**Filed**  
 JAN 10 2013  
 RICHARD W. WIEKING  
 CLERK, U.S. DISTRICT COURT  
 NORTHERN DISTRICT OF CALIFORNIA  
 SAN JOSE

IN THE UNITED STATES DISTRICT COURT  
 FOR THE NORTHERN DISTRICT OF CALIFORNIA

SONNY RAY HARDAWAY,	)	No. C 12-5372 RMW (PR)
Plaintiff,	)	ORDER OF DISMISSAL WITH
v.	)	LEAVE TO AMEND
BOARD OF PRISON TERMS, et al.,	)	
Defendants.	)	

Plaintiff, a state prisoner proceeding *pro se*, filed a federal civil rights complaint pursuant to 42 U.S.C. § 1983. Plaintiff has been granted leave to proceed in forma pauperis in a separate order. For the reasons that follow, the Court DISMISSES the complaint with leave to amend.

**DISCUSSION**

A. Standard of Review

A federal court must conduct a preliminary screening in any case in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity. See 28 U.S.C. § 1915A(a). In its review, the court must identify any cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a claim upon which relief may be granted or seek monetary relief from a defendant who is immune from such relief. See id. § 1915A(b)(1), (2). Pro se pleadings must, however, be liberally construed. See Balistreri v. Pacifica Police

1 901 F.2d 696, 699 (9th Cir. 1988).

2 To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements:  
 3 (1) that a right secured by the Constitution or laws of the United States was violated, and (2) that  
 4 the alleged deprivation was committed by a person acting under the color of state law. West v.  
 5 Atkins, 487 U.S. 42, 48 (1988).

6 B. Plaintiff's Claims

7 Plaintiff states that in 2011, he had a parole suitability hearing. Plaintiff claims that he  
 8 was wrongfully convicted, and he was denied an attorney or staff assistance at his parole hearing.  
 9 As the complaint currently reads, the court cannot fairly evaluate plaintiff's claims in their  
 10 present state. Further, it appears that plaintiff's claims may be more appropriately addressed in a  
 11 federal habeas petition.

12 Plaintiff is advised that, habeas is the "exclusive remedy" for the prisoner who seeks  
 13 "'immediate or speedier release'" from confinement. Skinner v. Switzer, 131 S. Ct. 1289, 1293  
 14 (2011) (quoting Wilkinson v. Dotson, 544 U.S. 74, 82 (2005)). "Where the prisoner's claim  
 15 would not 'necessarily spell speedier release,' however, suit may be brought under § 1983."  
 16 Skinner, 131 S. Ct. at 1293 (quoting Wilkinson, 544 U.S. at 82). As a consequence, challenges  
 17 to prison conditions have traditionally been cognizable only via Section 1983, while challenges  
 18 implicating the fact or duration of confinement must be brought through a habeas petition.  
 19 Docken v. Chase, 393 F.3d 1024, 1026 (9th Cir. 2004). If plaintiff is challenging an alleged  
 20 wrongful conviction, his remedy may be found through filing a habeas petition.

21 As a civil rights complaint, the complaint does not comply with the requirement that the  
 22 averments be "simple, concise, and direct." For example, plaintiff alleges that he was subject to  
 23 discrimination, fraud, harassment, intimidation, retaliation, libel and slander. Federal Rule of  
 24 Civil Procedure 8(a) requires that the complaint set forth "a short and plain statement of the  
 25 claim showing that the pleader is entitled to relief." Here, plaintiff has not provided the court  
 26 with the sufficient information necessary to determine whether any claim for relief has been  
 27 stated against any defendant. "While a complaint . . . does not need detailed factual allegations,  
 28 . . . a plaintiff's obligation to provide the 'grounds of his 'entitle[ment] to relief' requires more

1 than labels and conclusions, and a formulaic recitation of the elements of a cause of action will  
 2 not do. . . . Factual allegations must be enough to raise a right to relief above the speculative  
 3 level.” Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 553-56, (2007) (citations omitted). A  
 4 complaint should be dismissed if it does not proffer “enough facts to state a claim for relief that  
 5 is plausible on its face.” Id at 570. However, district courts must afford pro se prisoner litigants  
 6 an opportunity to amend to correct any deficiency in their complaints. Lopez v. Smith, 203 F.3d  
 7 1122, 1126-27 (9th Cir. 2000) (en banc).

8 Accordingly, the court will DISMISS the complaint with LEAVE TO AMEND to allow  
 9 plaintiff an opportunity to clearly state his grounds for relief under 42 U.S.C. § 1983, and  
 10 provide sufficient facts to support each claim if he can do so in good faith. If, however, plaintiff  
 11 discovers that his claims should instead be brought in a federal writ of habeas corpus, he may file  
 12 a notice of voluntary dismissal of this action, and open a new action by filing a petition.

### 13 CONCLUSION

14 1. Plaintiff’s complaint is DISMISSED with leave to amend.

15 2. If plaintiff can cure the pleading deficiencies described above, he shall file an  
 16 AMENDED COMPLAINT within **thirty days** from the date this order is filed. The amended  
 17 complaint must include the caption and civil case number used in this order (C 12-5372 RMW  
 18 (PR)) and the words AMENDED COMPLAINT on the first page. The amended complaint must  
 19 indicate which specific, named defendant(s) was involved in each cause of action, what each  
 20 defendant did, what effect this had on plaintiff and what right plaintiff alleges was violated.  
 21 Plaintiff may not incorporate material from the prior complaint by reference. If plaintiff files an  
 22 amended complaint, he must allege, in good faith, facts - not merely conclusions of law - that  
 23 demonstrate that he is entitled to relief under the applicable federal statutes. **Failure to file an**  
 24 **amended complaint within thirty days and in accordance with this order will result in a**  
 25 **finding that further leave to amend would be futile and this action will be dismissed.**

26 3. Plaintiff is advised that an amended complaint supersedes the original complaint.  
 27 “[A] plaintiff waives all causes of action alleged in the original complaint which are not alleged  
 28 in the amended complaint.” London v. Coopers & Lybrand, 644 F.2d 811, 814 (9th Cir. 1981).

1 Defendants not named in an amended complaint are no longer defendants. See Ferdik v.  
2 Bonzelet, 963 F.2d 1258, 1262 (9th Cir. 1992).

3 4. It is the plaintiff's responsibility to prosecute this case. Plaintiff must keep the  
4 court informed of any change of address by filing a separate paper with the clerk headed "Notice  
5 of Change of Address," and must comply with the court's orders in a timely fashion. Failure to  
6 do so may result in the dismissal of this action for failure to prosecute pursuant to Federal Rule  
7 of Civil Procedure 41(b).

8 IT IS SO ORDERED.

9 DATED: 1/10/2013

Ronald M. Whyte  
RONALD M. WHYTE  
United States District Judge